IN THE HIGH COURT OF BOMBAY AT GOA.

E.S.I. APPEAL NO. 7/2003.

Mr. Agostinho Menezes,
House No.1449, behind
Durga Petrol Pump
Fatorda, Margao, Goa. ... Appellant.

VERSUS

1. The Regional Director,
   Employees State Insurance
   Corporation, Panchadeep
   Bhavan, Panaji, Goa.

2. The Recovery Officer,
   Employees State Insurance
   Corporation, Panchadeep
   Bhavan, Panaji, Goa.

3. M/s Menezes D'Souza
   Enterprises Pvt. Ltd.,
   represented by its Director
   Mr. Antonio Xavier J.C.
   D'souza, having office at
   Isidoro Baptista Road,
   Margao, Goa. ... Respondents.

Mr. G.K. Sardessai with Mr. V.A. Palekar, Advocates for the Appellant.

Mrs. A.A. Agni with Ms. Asha Dessai, Advocates for the Respondents No.1 and 2.

CORAM: R. J. KOCHAR, J.

DATE: 19TH SEPTEMBER, 2003.

ORAL JUDGMENT:

Appeal is admitted and the same is heard and disposed of at the stage of admission itself by consent of the parties.

2. The appellant is aggrieved by the impugned Order dated 25th April, 2003 passed by the Employees Insurance Court, dismissing the application filed by the appellant under Section 77 read with Section 75 of the E.S.I. Act, 1948 (hereinafter referred to as the Act). According to the appellant, his establishment was not liable to pay the contribution as claimed by the Respondent under Orders dated 28.7.1999, 1.9.1998 and Notice dated 29.07.2002 and therefore he challenged the legality and validity of the same in his application as aforesaid. The appellant also prayed for condonation of delay in approaching the Court by filing a separate application for the purpose on 14th August, 2002.

3. The Trial Court heard both the parties on the issue of condonation of delay and held against the appellant refusing to condone the delay in filing of the application under Section 77 r/w Section 75 of the Act seeking to challenge the aforesaid 3 Orders of the Respondents.

4. The learned Judge has held that the appellant had miserably failed to give any explanation whatsoever, much less a good explanation for the delay of over a year in filing the

application under Section 77 of the Act. The learned Judge has also observed that delay could not be just condoned for the asking only by saying that it is just of a year. The learned Judge has considered this issue in his order of nine pages in 25 paragraphs. It appears that the respondents had seriously contested the issue of limitation which required the learned Judge to set out the case law and the reasons for his refusal to condone the delay.

5. Shri Sardessai, the learned counsel appearing for the appellant, has strenuously urged before me that the appellant was under a bonafide impression that since the respondents had instituted criminal proceedings against the Appellant before the Judicial Magistrate on 2nd April, 1999, 3rd April, 1999 and 5th April, 1999 under Section 85 of the Act for non-compliance of the aforesaid 3 Orders requiring him to pay the amounts of contributions thereunder and as the subject matter in respect of coverage of his establishment was the same, he bonafide believed that that issue would be resolved before that forum. Shri Sardessai also submitted that his client was pursuing the criminal proceedings before the Judicial Magistrate. However, meanwhile, he was advised to challenge the Orders passed by the respondents, calling upon the appellant to pay

contribution under the Act vide the Orders under Section 45-A of the Act passed on 28.7.1998, 1.9.1998 and 1.9.1998 under Section 77 r/w Section 75 of the Act before the E.I. Court. After getting such advice, the appellant filed the application under Section 77 r/w Section 75 of the Act challenging the aforesaid three Orders passed by the respondents. This application was filed on 14th August, 2002. He sought a declaration from the Court that the appellant's establishment was not covered under the provisions of the Act and therefore he was not liable to pay any contribution under the Act. He also prayed for other consequential orders including an order to quash and set aside the aforesaid three orders passed by the respondents under Section 45-A of the Act. In these circumstances according to the learned counsel, there was a delay in filing the aforesaid application and that it deserved to be condoned.

6. It appears that the appellant was further properly advised though late, also to file an application for condonation of delay as there was a delay of one year in challenging the aforesaid three Orders passed by the Respondent-Corporation under Section 45-A of the Act which he could challenge only within the prescribed period of limitation of three

years. As stated earlier, the learned Judge of the Trial Court heard the said application for condonation of delay and decided the same against the appellant refusing to condone the delay. The appellant's main ground for condonation of delay was the pendency of the criminal proceedings under Section 85 of the Act in respect of the same subject matter.

7. There is no dispute that these three criminal proceedings were instituted by the respondent/Corporation against the appellant and the same are still pending. It is also true that the appellant ought to have challenged the aforesaid three Orders passed by the respondent/Corporation under Section 45-A of the Act within a period of three years. Meanwhile, it appears, that the appellant on getting proper and correct advice approached the E.I. Court for getting substantive relief of declaration that his establishment was employing less than 20 employees and therefore was not covered by the provisions of the Act. According to the appellant if such declaration is granted, his establishment in that case he would perhaps also succeed in the criminal proceedings and would get away from the clutches of the Act. But since his application was not within the prescribed period of

limitation he met with a stiff resistance by the Respondents. Shri Sardessai has relied on a judgment of the Supreme Court reported in **The Madras Port Trust v. Hymanshu International by its Proprietor V. Venkatadri (dead) by L.Rs.,** A.I.R. 1979 S.C. 1144 in support of his submission that the Government/public authorities should not raise technical plea of limitation for the purpose of defeating legitimate claims of citizens. It would be useful to reproduce paragraph 2 of the judgment of the Supreme Court:-

> " We do not think that this is a fit case where we should proceed to determine whether the claim of the respondent was barred by S.110 of the Madras Port Trust Act (II of 1905). The plea of limitation based on this section is one which the court always looks upon with disfavour and it is unfortunate that a public authority like the Port Trust should, in all morality and justice, take up such a plea to defeat a just claim of the citizen. It is high time that governments and public authorities adopt the practice of not relying upon technical pleas for the purpose of defeating legitimate claims of citizens and do what is fair and just to the citizens. Of course, if a government or a public authority takes up a technical plea, the Court has to decide it and if the plea is well-founded, it has to be upheld by the Court, but what we feel is that such a plea should not ordinarily be taken up by a government or a public authority,

> unless of course the claim is not well-founded and by reason of delay in filing it, the evidence for the purpose of resisting such a claim has become unavailable. Here, it is obvious that the claim of the respondent was a just claim supported as it was by the recommendation of the Assistant Collector of Customs and hence in the exercise of our discretion under Art. 136 of the Constitution, we do not see any reason why we should proceed to hear this appeal and adjudicate upon the plea of the appellant based on S. 110 of the Madras Port Trust Act (II of 1905). "

8. Even after 1979 the Supreme Court has consistently frowned upon the Government and public authorities which tried to stick up to the technical pleas of limitation, time and again to avoid decision on merits. The Supreme Court has always held that the Government and the public authorities should get the disputes resolved on merits instead of wasting valuable judicial time of the Courts in pursuing frivolous pleas of limitation. In the present case the appellant though Director of his establishment claiming to employ about 18 employees has not ceased to be a layman. He cannot be blamed if he was under a genuine and bonafide impression that criminal proceedings are pending before the Judicial Magistrate for the same subject matter and that he need not approach any other forum and that he had no knowledge of institution of other separate proceedings under Section 77 r/w section 75 of the

Act before the E.I. Court to challenge the orders passed by the respondents under Section 45-A of the Act. According to me this is a good and sufficient ground to condone the delay of one year. There is no dispute that the appellant is seeking a declaration under Section 77 r/w section 75 of the Act from the Court that his establishment is not covered by the provisions of the Act. If he finally succeeds before the E.I. Court on this ground, it is possible that he would get substantive relief even in the criminal proceedings. According to me, in the light of the observations of the Supreme Court (Supra) there is more than sufficient and good cause to condone the delay of one year in approaching the E.I. Court. It is not that the appellant has merely said that there is only one year delay and therefore such delay should be condoned. As lightly observed by the learned Judge the appellant was not praying that the delay should be condoned because the delay was only of one year. According to the appellant, since he was pursuing the criminal proceedings and since he was of bonafide belief and impression that his dispute would be resolved by the Judicial Magistrate if he finally succeeds in that Court. There is nothing unusual or abnormal in the thinking of any common man that if some Court is seized of the same dispute and therefore he need not knock the doors of

any other Court. In my opinion, in the present case, the delay in filing the application under Section 77 r/w section 75 deserves to be condoned. According to me the respondents ought to have gracefully agreed to condone the delay, at least before this Court. The learned counsel appearing for the respondents obviously was under instructions, not in a position to concede to condone the delay and go before the E.I. Court for trial on merits. I cannot blame her. However, it is the attitude of the concerned officers in the Corporation which I strongly deprecate. Instead of fighting the battle on the technical ground of limitation, in wasting the valuable judicial time, the respondents as public Corporation ought to have insisted upon the resolution of the controversy on merits before the E.I. Court. It is unfortunate that inspite of umpteen number of judgments of the Supreme Court advising the bureaucracy not to pursue the matters on technical grounds our bureaucracy is always found to take pleasure in wasting the judicial time of the Courts by pursuing the technical point of limitation and other similar frivolous points. In the circumstances, I quash and set aside the impugned judgment and order of the E.I. Court and remand the matter back to the Court for decision on merits of the case in accordance with law.

9. I was inclined to resolve the entire controversy here by directing the appellant's establishment to deposit the entire amount of Rs.2,16,455/- in respect of the aforesaid three Orders. Though the original contribution claimed by the respondents from the appellant amounted to Rs.89,353/- the aforesaid amount of Rs.2,16,455/- has swollen by the addition of interest at the rate of 15% per annum under the provisions of law. I was inclined to direct the appellant's establishment to pay off this amount and to put an end to the criminal proceedings also. By asking the appellant to deposit the aforesaid amount, I thought it proper that he also gets relief from the criminal proceedings. However, Mrs. Agni, the learned counsel for the respondent was unable to make a statement that the criminal proceedings would be dropped. It would have been just and fair for the administration of the Corporation to have agreed to the said suggestion. After all the Corporation is concerned with the welfare and benefit of the employees. The Corporation would have got the aforesaid amount without any serious contest. However, none appears to take any responsibility in respect of the criminal proceedings. In these circumstances, I direct the appellant's establishment to deposit the amount of Rs.89,353/- under the said 3 Orders within four weeks

from today with the respondent-Corporation without prejudice to the rights and contentions of the appellant and the appellant's establishment. If however the appellant succeeds, in that case the Corporation would be liable to refund the said amount with interest at the rate of 15% per annum. The learned Judicial Magistrate while deciding the cases between these parties shall bear in mind and take into account that the Appellant herein has complied with the orders which are the subject matter of the criminal proceedings before him. It would be an extenuating circumstance if he is to be convicted and sentenced, if found guilty.

10. The appeal succeeds and the same is allowed. The E.I. Court shall decide the application in accordance with law. No order as to costs.

R. J. KOCHAR, J.

sl.